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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

FEDERAL POWER COMMISSION, PETITIONER

v.

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY, AND EL PASO NATURAL GAS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 24, 1963.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit (App. A, *infra*, pp. 22–37) are reported at 323 F. 2d 190. The opinions and orders of the Federal Power Commission (R. 256–277, 332–334) are reported at 26 FPC 606 and 840.

JURISDICTION

The judgment of the court of appeals setting aside the Commission's order was entered on September 24, 1963 (App. B, *infra*, pp. 38–39). A timely petition for rehearing was denied on December 17, 1963 (App. C, *infra*, pp. 40–41). On March 10, 1964, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

When a producer sells natural gas to an interstate pipeline company, which commingles it with gas from other sources and uses some of the mixture for local sales or in the operation of the pipeline, but sells the bulk in interstate commerce, may the producer and pipeline defeat the jurisdiction of the Federal Power Commission over "sales in interstate commerce for resale" by stipulating, contrary to the physical fact, that the producer's gas will all be consumed within the State or by the pipeline itself?

STATUTE INVOLVED

Section 1(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717(b), provides as follows:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies

engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

This case involves the jurisdictional status, under Section 1(b) of the Natural Gas Act, of two sales which Lo-Vaca Gathering Company and Houston Pipe Line Company propose to make to El Paso Natural Gas Company. El Paso, one of the country's largest interstate natural gas pipelines, obtains its gas supplies chiefly in the Panhandle and Permian Basin areas of western Texas and the San Juan Basin in northwestern New Mexico. Its main transmission lines extend in two parallel systems from western Texas, across New Mexico and Arizona, to the California border. While it has many customers along the route, the bulk of its deliveries are made at the Arizona-California border to three California distribution companies, including two of the intervenors below, Southern Counties Gas Company and Southern California Gas Company.[1]

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[1] This description is based upon the statement of facts in *People of the State of California* v. *Federal Power Commission*, 296 F. 2d 348 (C.A.D.C.), reversed, 369 U.S. 482. It describes the El Paso system prior to the merger with Pacific Northwest Pipeline Corporation. Commission authorization of that merger was set aside by this Court in the cited case and divestiture was ordered in *United States* v. *El Paso Natural Gas Co.*, No. 94, this Term.

The two companies named in the text and the State of California have already filed petitions for certiorari in the instant case, Nos. 914 and 915, this Term.

The Lo-Vaca Contracts.—In 1960, El Paso entered into two contracts with Lo-Vaca Gathering Company for the purchase of gas in the Texas Gulf area, to be delivered for El Paso's account to El Paso Gas Supply Company, a wholly owned subsidiary, at a point in the immediate vicinity of Three Rivers, in Live Oak County, Texas (R. 256–257).[2] Gas Supply was to construct a compressor station at Three Rivers (the Coquat Station) and a 227-mile pipeline from Three Rivers to one of the southernmost points of the present El Paso system, the Sonora plant in Sutton County, Texas (R. 256–257).[3] One of the El Paso-Lo-Vaca contracts, dated May 16, 1960, is admittedly a sale in interstate commerce for resale, and is not involved in this proceeding.[4] The other contract, dated March 15, 1960, provides for the delivery to El Paso of 50,000 Mcf of gas per day at an initial price of 22¢ per Mcf, with escalations during the twenty-year term up to 26¢ (R. 142,257). It contains the following provisions, which, in the view of the majority below, have the effect of precluding Commission jurisdiction (R. 149):

> All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's

[2] Lo-Vaca is not itself a producer of natural gas, but will purchase the gas it proposes to resell to El Paso from a number of producers (R. 122–123).

[3] A map of the El Paso System with these proposed additions appears at R. 335, the last page of the main volume of the Joint Appendix in the court below.

[4] The contract originally called for the delivery of an average of 50,000 Mcf of gas per day at Coquat. The amount was later increased to 80,000 Mcf per day (R. 257).

> compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

In Article X, Section 2, the contract adds (R. 142):

> It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale. * * * [5]

This "restricted use" agreement provides for the separate metering of the contract volumes prior to their delivery into El Paso's system at Three Rivers. El Paso has stated that it will meter the gas used for fuel purposes in its New Mexico and Arizona facilities to make certain that this amount will invariably exceed the volumes of gas simultaneously taken from La Vaca under the "restricted use" contract. (App. A, *infra*, p. 24, R. 260).[6]

The Houston sale.—By a contract dated July 19, 1960, Houston Pipe Line Company proposed to sell to El Paso, over a 20-year term, an average of 70,000

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[5] La Vaca has indicated, however, that it intends to sell gas under both contracts even if the Federal Power Commission has jurisdiction over the allegedly "restricted use" contract (R. 258).

[6] The metering of volumes of gas consumed in the compressor stations and other facilities of the pipeline is not peculiar to the present case; indeed it is required by the Commission's Uniform System of Accounts in order to determine what portion of gas purchase costs should be attributed to the transmission-expense accounts. F.P.C. Uniform System of Accounts for Natural Gas Companies (Class A and Class B) Account 854, 18 C.F.R. Part 201, Account 854.

Mcf of gas per day, which it would purchase from various producers. The price to El Paso is to be determined under a formula which, in effect, adds 6⅛¢ per Mcf to Houston's average gas purchase cost (R. 94–95). As in the case of Lo-Vaca, Houston's gas would be delivered to Gas Supply's pipeline at the Coquat Station. It, too, would be metered separately (R. 59). The Houston contract contains a "restricted use" provision by which Houston purports to limit its gas to use within Texas (R. 78):

> * * * it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that the gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. * * *

It provides further for the metering of the gas used at the various places in Texas and includes a covenant by El Paso that the Texas uses will at all times exceed the amount simultaneously taken from Houston (R. 78–79). Houston's president acknowledged that his company's gas would actually be used outside of Texas and that the restriction was purely contractual (R. 53, 55, 56–57).

Soon after the execution of the contract, Houston petitioned the Commission for a declaratory order

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[7] F.P.C. Rules of Practice and Procedure, § 1.7(c), 18 C.F.R. 1.7(c).

to the effect that the proposed sale would not be a sale in interstate commerce. Since most of its supply was purchased under contracts permitting the producers to cancel if their gas is to be resold by Houston in interstate commerce (R. 180–182), Houston alleged a need for immediate removal of any uncertainty as to the jurisdictional status of its proposed sale to El Paso.

The facts of gas flow.—The gas to be supplied by Lo-Vaca and Houston would be physically commingled after entry into Gas Supply's pipeline at the Coquat Station (R. 60). A small portion of this stream would be used as fuel in operating the Coquat compressor station, some would go the way of "line loss" in Gas Supply's pipeline from Coquat to Sonora, and some would be consumed at El Paso's Sonora dehydration plant (R. 61, 116, 117, 259). The rest would move, commingled with gas from the Sonora plant and other sources, through El Paso's mainline to Benedum Junction in Upton County, Texas, where the stream would divide (R. 61, 119, 259). At this stage, one portion would flow toward El Paso's Goldsmith Plant in Ector County, Texas, then northward to Plains, Texas (R. 259), and then westward through El Paso's northern pipeline through New Mexico and Arizona to the California border (*ibid.*). Gas from numerous sources would enter the stream between Benedum Junction and Plains; at Plains itself a stream from the Texas Panhandle would be added, and in New Mexico, San Juan Basin gas would enter the northern line (R. 62–65, 115, 259, 335).

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The other portion of the stream would flow from Benedum Junction through Crane County, Texas, to El Paso's Keystone compressor station in Texas (R. 259).[8] From there, the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas, again into New Mexico near the City of El Paso, and on to the border of California. In New Mexico gas is added from various sources in that State and in Texas (R. 259). El Paso, however, had a pending application to construct a line from the Keystone Station to west Texas, and the Commission assumed the existence of that facility for purposes of this case. The building of this line would make it possible for El Paso to supply its west Texas compressor stations with gas produced and transported entirely in Texas. But, even then, the particular source or seller of the gas so used could not be determined since that gas would come from the commingled stream leaving El Paso's Keystone Station (R. 259–260).[9]

While both the El Paso-Lo-Vaca and El Paso-Houston contracts specify restricted uses for the gas

[8] This is the center of El Paso's Permian Basin facilities and one of its most important areas of gas supply. The flow diagram of the Permian Basin portion of the El Paso system which appears at R. 119 gives a fair impression of the great number and complexity of gas flows into the lines on this one portion of El Paso's system.

[9] Since the time of the decision below, El Paso has withdrawn the application for these particular pipeline facilities because the Commission had denied a continuance of the hearing which El Paso had requested to up-date the application. This withdrawal does not preclude El Paso from filing a new application to build comparable facilities.

sold under those contracts, it is conceded by respondents' officials that the gas sold by Houston and Lo-Vaca will flow in a commingled stream with all the other gas and that at least a portion of the Houston and Lo-Vaca gas will in fact be used for resale in interstate commerce outside of Texas. See, *e.g.*, testimony of El Paso's chief pipeline engineer (R. 66).[10]

The decision below.—The Commission (one Commissioner dissenting as to the Houston sale) held that the sales of both Houston and Lo-Vaca would be sales for resale in interstate commerce and thus subject to its jurisdiction (R. 254–274). The court below (in an opinion by Judge Cameron, Judge Rives dissenting) set aside the Commission's determinations. Although it expressly recognized (App. A, *infra*, pp. 24–25) that most of the gas sold under the restricted use contracts would in fact be resold in interstate commerce, the court concluded that since gas is fungible, separation into different uses could be determined by contract. The majority observed (App. A, *infra*, p. 31) that while it "may well be that the State of Texas has no incentive to regulate the cost" of the gas sold to El Paso under the "restricted use" contracts, the existence of such a regulatory gap has "no rele-

[10] As a corollary to these admissions, it was conceded that the exhibits (R. 116, 117) introduced by respondents purporting to specify the particular facilities that would utilize Houston or Lo-Vaca gas were based entirely on the attribution to those uses made by the contracts with El Paso (R. 54–55, 360–361). Pages 336–364 of the Record comprised the "Supplemental Joint Appendix" below which was numbered separately from the main volume. Thus, R. 360–361 was pp. 23–24 of that Supp. J. App.

vance in interpreting the statute." Judge Rives, dissenting, stated that none of the cases relied upon by the majority "permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular 'restricted' use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality" (Appendix A, *infra*, p. 37).

REASONS FOR GRANTING THE WRIT

This case presents an important question as to the scope of the Power Commission's jurisdiction over "the sale in interstate commerce of natural gas for resale." The court of appeals' disposition of this issue departs from the principles which this Court has consistently applied.

It is settled that where part of a stream of natural gas or electric energy sold under a single contract is interstate in character and is resold by the purchaser, the entire transaction falls within the Commission's jurisdiction, even though the remainder is consumed by the purchaser itself or within the producing State. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 419–420; *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 316–318; *Federal Power Commission* v. *Southern California Edison Co.*, No. 71, this Term. But for the

contract language, therefore, both these transactions would be subject to federal regulation. The question thus narrows: Is the jurisdictional status of a sale governed by what the purchaser actually does with the gas—*i.e.*, by the physical facts of gas flow—or is it controlled by the recitations of contract? The holding below—that the Commission's jurisdiction may be defeated by artificial contractual restrictions bearing no relationship to reality—is without basis in the statute, is contrary to the jurisdictional standards laid down by this Court, and creates a serious gap in the comprehensive regulatory scheme which Congress constructed for the protection of consumers.

1. (a) This Court has consistently based its jurisdictional decisions under the Natural Gas and Federal Power Acts upon a consideration of the physical facts. *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 467. The controlling principle, declared in *Connecticut Light & Power Co.* v. *Federal Power Commission.*, 324 U.S. 515, 529, and reiterated only this Term in *Federal Power Commission* v. *Southern California Edison Co.*, slip op., p. 4, fn. 5, is that federal jurisdiction is to be determined by:

> an engineering and scientific, rather than a legalistic or governmental, test.

Accordingly, gas which actually crosses a State border at any stage in its progress from well-head to ultimate consumption is "in interstate commerce" (cf.

Jersey Central Power & Light Co. v. *Federal Power Commission, supra*).[11]

The same emphasis upon concrete facts has characterized this Court's approach to the question whether a sale is "for resale" and accordingly subject to the Commission's rate regulation. In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, a utility sold electric energy to the Navy Department, which used approximately 75% of it for its own consumption and resold the remainder to persons residing in a government housing project. This Court held that the entire transaction was subject to regulation by the Power Commission, stating (345 U.S. at 316):

> Certainly the *concrete fact of resale* of some portion of the electricity transmitted from a state to a point outside thereof invokes federal jurisdiction at the outset, despite the fact that the power thus used traveled along its interstate route "commingled" with the other power sold by the same seller and eventually directly consumed by the same purchaser-distributor * * * [emphasis added].

The Court dismissed as "insubstantial" the company's contention that the contracts were not "for resale" because they did not state as much. There is no reason why a contract such as Lo-Vaca's, which purports to preclude resale, albeit the parties know that an appreciable portion of the gas will in fact

[11] Section 2(7) of the Natural Gas Act defines "interstate commerce" as commerce between any point in a State and any point outside thereof.

be resold, can have any greater significance than a contract, such as the one in *Public Utilities Commission,* which simply ignored the fact of resale altogether.

To be sure, the Court left open the question whether federal jurisdiction would extend to "an essentially separate transaction covering the power directly consumed by the purchaser" (345 U.S. at 317–318). However, the Court's comments as to the possible relevance of a "separate transaction" must be read in light of the situation actually presented in the *Public Utilities Commission* case. There, the Navy received its entire supply of electric energy from a single source. Accordingly, a contract such as the Court envisaged—one which covered the measurable amount of energy directly consumed by the Navy—would also have covered the precise amount of "not-for-resale" energy actually supplied by that particular seller. It would neither have attributed to that seller energy which in fact was supplied by some other company, nor labeled as "non-jurisdictional" a portion of the seller's supply which in fact was used by the buyer for resale. In short, such a "separate transaction" would not have suffered from the twin vices of the Lo-Vaca contract. Nothing in *Public Utilities Commission* supports, and much negates, the view of the majority below that a contract may be used to "declare" jurisdictional facts at odds with reality, and thus to avoid federal jurisdiction over a major but indeterminate portion of the seller's gas which is in fact destined for resale. Moreover, in analogous "in-

terstate commerce" cases, this Court has repeatedly disregarded contracts which give fictitious constructions to business transactions solely for the purpose of achieving a particular jurisdictional result. *E.g.*, *Sprout* v. *South Bend*, 277 U.S. 163, 168; *B. & O. S.W. R.R. Co.* v. *Settle*, 260 U.S. 166, 170; *Eureka Pipe Line Co.* v. *Hallanan*, 257 U.S. 265. See Powell, *Physics and Law*, 58 Harv. L. Rev. 1072, 1077–1078.[12]

The Houston and Lo-Vaca contracts do just that. Although the gas used to fuel El Paso's compressors comes from a variety of sources, El Paso has singled out these two suppliers for special treatment, arbitrarily designating 100% of their contract volumes as "non-jurisdictional". The "restricted-use" provisions in these two contracts could have no conceivable pur-

[12] In *Sprout*, this Court, speaking through Mr. Justice Brandeis, held that a motor bus line could not transform itself into an entirely interstate carrier simply by requiring each passenger to purchase a ticket to an out-of-state point and by holding itself out as an interstate carrier only.

In *Settle*, the Court dealt with an elaborate contractual scheme designed to make the final segment of an interstate transportation appear to be wholly intrastate by interrupting the transit and delivering the goods to a "consignee" for several days before reshipping them to their ultimate destination. Looking to the shipper's actual business purpose—to get his goods to the ultimate point—the Court concluded that the entire transportation from beginning to end constituted interstate commerce, to which an interstate rate was applicable. In contrast are such cases as *Atlantic Coast Line R.R.* v. *Standard Oil Co.*, 275 U.S. 257, where the activities carried on within the State by the shipper after receipt of goods from interstate commerce have genuine business utility so that the goods may be fairly regarded as having come to rest; then any subsequent transportation within the State is a separate intrastate matter.

pose or effect other than to avoid federal jurisdiction. Their removal from the Houston and Lo-Vaca contracts, and their insertion in the contracts of other suppliers, would not require the slightest change in El Paso's actual operations or in the routing of gas through its system.

(b) *City of Hastings, Nebraska* v. *Federal Power Commission,* 221 F. 2d 31 (C.A.D.C.), certiorari denied, 349 U.S. 920, and *North Dakota* v. *Federal Power Commission,* 247 F. 2d 173 (C.A. 8), the decisions chiefly relied upon by the court below, are inapposite. Those cases merely hold that when gas is received by a purchaser through a single conduit and used both for jurisdictional purposes (resale in interstate commerce) and non-jurisdictional purposes (direct consumption by the buyer or resale in intrastate commerce), the latter portion must be the subject of a separate contract or transaction in order to be exempt from the Commission's regulation. See *United States* v. *Public Utilities Commission, supra.* But while both cases recognize that "segregation by contract" is a necessary condition for exemption, neither holds that it would be a sufficient condition in a case, such as the present one, where the contract has no basis in reality.

In *Hastings,* the city received all its gas from an interstate pipeline at a number of city-gate delivery points, and used the supply partly for resale and partly as boiler fuel in its own electric generating plant; the volumes used at the plant were metered there after traveling through the city's system com-

mingled with the volumes used for resale. The pipeline's federally-regulated rate schedule contained a provision making the rates inapplicable to "gas used or consumed by Utility * * * for industrial purposes." Rejecting the city's contention that the pipeline's delivery at the city gate constituted a single sale subject in its entirety to FPC jurisdiction, both the Commission and the court of appeals concluded that the gas used at the power plant was attributable to a separate sale for direct consumption, which the Commission was forbidden to regulate under § 1(b).

The *North Dakota* case bears the same relationship to the Houston sale as *Hastings* bears to the Lo-Vaca transaction. At issue there was the jurisdictional status of a sale in North Dakota by two producers (Signal and Amerada) [13] to an interstate pipeline (Montana-Dakota) for resale in four small towns within the State. The gas was delivered to Montana-Dakota at an extraction plant which Signal operated at Tioga, North Dakota. From there the pipeline moved westward into Montana, serving the four North Dakota towns by means of laterals branching off the line, and transporting in a single stream the gas which was diverted to the towns and that which continued across the border for resale in

[13] Amerada owned 85 percent of the commingled stream delivered to Montana-Dakota and Signal, the remaining 15 percent. 16 F.P.C. 401, 403. Each executed separate sales contracts, but the Commission and the court of appeals treated them as one—perhaps because the volumes supplied by the two producers were delivered to the pipeline as a single stream of gas emanating from a single extraction plant.

Montana. Significantly, the Tioga plant was the pipeline's only source of supply in the State; no other gas entered the pipeline between Tioga and the Montana border. It was in these circumstances that the Eighth Circuit upheld the Commission's determination that the sale for resale in the four towns—a transaction covered by a separate contract—was not a sale "in interstate commerce."

The critical difference between *Hastings* and *North Dakota,* on the one hand, and the present case, on the other, is that in the former the purchaser obtained its entire supply from a single source. It was possible, therefore, to determine what proportion of the particular seller's gas was resold by the buyer in interstate commerce and what proportion the buyer consumed itself or resold within the State. In both of the earlier cases, the contractual separation corresponded to the separation of the seller's gas into these two measurable components. Every molecule supplied by the seller and actually resold by the buyer in interstate commerce remained subject to FPC regulation; and, conversely, every molecule which was used by the buyer for non-jurisdictional purposes, and thus exempted from federal regulation, was attributable with absolute certainty, and without resort to any fiction, to the particular supplier whose rates were at issue.[14] The cases, therefore, are entirely consistent

[14] It is true but immaterial that in *Hastings* and *North Dakota* the jurisdictional and non-jurisdictional volumes commingled for a time in the purchaser's system and were physically separated only when metered at the point of use. What distinguishes the Houston and Lo-Vaca contracts and renders

with the principle we urge here, *i.e.*, that the Commission's jurisdiction is governed by the actual facts of gas flow, rather than by contractual artifice.

2. The decision below would create a serious gap in the comprehensive regulation which Congress has established for protection of consumers. No State could be expected to regulate a sale by a producer to an interstate pipeline for ostensible use in the latter's own operations.[15] The producing State (here, Texas), though perhaps having the power, would have little interest in regulating an item of pipeline cost which would be reflected chiefly in the rates paid by consumers in other States. And the consuming States that might have an interest (here, New Mexico, Arizona, and California) would have no power to regulate sales of gas outside their own borders. By its decision, the court below thus creates a class of sales by independ-

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them wholly artificial is not the obvious impossibility of earmarking specific molecules as "non-jurisdictional" at the point they are delivered into El Paso's system, but the impossibility of attributing to any particular seller—*i.e.*, of identifying as "Houston's" or "Lo-Vaca's"—the volumes actually used for non-jurisdictional purposes even after those volumes are physically separated from the main stream. The Commission asserted jurisdiction here not, as the court below suggests (App. A, *infra*, pp. 25, 26), merely because the gas proposed to be supplied by Houston and Lo-Vaca would travel through the same pipeline with gas destined for resale in interstate commerce, but because a large but indeterminate part of the Houston and Lo-Vaca gas would itself be resold in interstate commerce, notwithstanding the "restricted use" provisions in the contracts.

[15] The minor part of the gas sold under the Houston contract which is designated for resale to Phillips for consumption as fuel for a gasoline extraction plant has not been the object of State regulatory concern.

ent producers which are free from any effective regulation, either State or federal.[16]

Under the Fifth Circuit's views, each interstate pipeline that uses a portion of the stream of gas to fuel its compressors and other auxiliary facilities (and that is almost every company) would be free to enter into as many non-jurisdictional contracts as it can fit within the volumetric limits of its use for these purposes.[17] The Commission's "Statistics of Natural Gas Companies—1962" (the latest year available) show that the 40 major natural gas pipeline companies consumed more than $85,000,000 worth of gas in operating their utility facilities, principally compressor stations. This represents almost 4% of the total gas purchase costs of those companies.[18] Thus, without in any way changing their actual operations, pipelines could create a substantial unregulated market for the benefit of particular producers merely by inserting into contracts of their choosing restrictive

[16] Presumably the decision would be equally applicable to jurisdictional questions under the Federal Power Act. Since electric energy is generated in the States of consumption to a much larger extent than gas, the opinion below, if left standing, would particularly invite the writing of purely fictional "restricted use" contracts by electric utilities in order to obtain the regulatory climate they believe most sympathetic to them.

[17] This would also mean, as noted by the Commission (R. 269–270), that any pipeline could favor such producers as it might choose by entering into this type of unregulated contract with them.

[18] In El Paso's case, the cost of gas used to operate its utility plant is more than 7½ percent of its total gas purchase costs. *Ibid.*

language similar to that employed in the Houston and Lo-Vaca contracts.[19]

As this Court noted in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28:

> Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. * * *

[19] In addition to its direct impact on a purchaser's cost, the establishment of a sizable unregulated intrastate market could readily generate pressures to increase the general price level at which gas will be available for jurisdictional purposes, and also cause the triggering of favored-nations and other contract price-changing clauses. See *Federal Power Commission* v. *H. L. Hunt*, No. 273, this Term, slip op., p. 10.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1964

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

(September 24, 1963)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

CAMERON, Circuit Judge: The question here involves solely the extent of the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act.[1] The facts underlying the controversy pre-

[1] The section outlining jurisdiction is 15 U.S.C.A. § 717(b): "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, *to the sale in interstate commerce of natural gas for resale* for ultimate

sented by this petition for review of an order of the Federal Power Commission are not in dispute and are, briefly, as follows:

Lo-Vaca Gathering Company (Lo-Vaca) requested certificate authority with respect to two contracts involving the delivery of natural gas to El Paso Natural Gas Company (El Paso). The first request involved the "gathering and delivery" to El Paso of 50,000 Mcf (meaning, thousand cubic feet) of natural gas per day, and the second involved the "gathering and sale" of 70,000 Mcf per day. Authority requested under the first contract is thus limited to the "gathering and delivery" rather than the sale of the gas. Petitioners contend that regulation of the *sale* is not within the Commission's jurisdiction under the Act because that volume of gas is not to be resold. The contract provides:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

Jurisdiction is not disputed as to the second Lo-Vaca contract.

Houston Pipe Line Company (Houston) proposes to sell to El Paso 70,000 Mcf of natural gas per day to be consumed wholly within the State of Texas.

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public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other* transportation or *sale of natural gas* or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [Emphasis added.]

The contract provides that the gas sold "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas."

It is not necessary here to outline the complicated routing of the gas through El Paso's multiplex lines. It is enough to say that, in each instance, petitioners propose to meter into the system, in Texas, the specified volumes of gas; that this gas will be commingled with gas already in the lines (which gas is admittedly "jurisdictional"); that other gas will later be put into the lines; and that, at the points described in the quoted clauses of the contract, an equal volume of gas will be withdrawn for "non jurisdictional" use. The Commission does not claim that the physical in-metering—out-metering will not be faithfully consummated just as the contracts provide; rather, it argues that as a matter of physical reality the gas withdrawn will not be "non jurisdictional" gas because it will not be the *identical* gas metered into the lines under the contracts.

More quickly to delineate the issue drawn here, it should be noted that the Commission admits, as it must, that if the volumes under consideration were in some manner physically segregated it would not and could not claim jurisdiction over the sales. The Houston sale would not be subject to the Commission's jurisdiction because it would not be a "sale in interstate commerce;" and the Lo-Vaca sale, though in interstate commerce, would not be "for resale." 15 U.S.C.A. § 717(b). See, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 1947, 332 U.S. 507. The Commission contends, however, that the physical nature of natural gas cannot be overcome by the words of the contract. In

short, it urges that the fact is that some, and actually most, of the molecules sold will *actually* be resold in interstate commerce. This physical fact cannot be doubted, gas being the substance it is, but the real question before us is whether the physical commingling of the gas sold under the contracts with other gas destroys its "non jurisdictional" status.

We hold that it does not. Gas is gas, and borrowing the words of Judge Brown, in connection with a different petroleum problem, " * * * the principles of constitutional law and statutory construction are not equated with laws of physics, so that the inquiry is something more than the schoolboy's quest for molecular identification." *Deep South Oil Co. of Texas* v. *Federal Power Commission,* 1957, 5 Cir., 247 F. 2d 882, 891 (dissenting opinion).

First, we may discuss what is *not* involved. No question of constitutional limitations under the Commerce Clause need be considered. The Commission's jurisdiction under § 717(b) is not so broad as the scope of the federal power under Art. 1, Sec. 8, Cl. 3 of the Constitution. Its jurisdiction over the sale of natural gas is limited:

> "Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. * * *
>
> "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at

which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana, supra* at 516, 517.

And, as we have said, the sales would admittedly be "non jurisdictional" if the gas so sold were not mixed and commingled with other gas which was to be resold in interstate commerce. So the question is more finely drawn: if the gas metered out for "non jurisdictional" use will not be made up of the identical molecules as the gas so metered in, does the Commission thereby gain jurisdiction of the sale? Petitioners rely principally on two cases from the courts of appeal[2] to support their theory of "fungibility" or "separation by contract." These cases, in turn, rely on the language of *United States* v. *Public Utilities of California,* 1953, 345 U.S. 295. The *Public Utilities of California* case is the starting point.

The Navy contracted with California Electric Power Company to purchase electrical energy in California for the Navy's use[3] in Nevada. Delivery of the power was made at a sub-station about twenty-five miles from the Nevada line. The Power Company argued that jurisdiction of the Commission attached only to that portion of the energy resold by the Navy. Assuming *arguendo* that the energy could be so divided for jurisdictional purposes, the Court said that such separability "would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable

[2] *North Dakota* v. *Federal Power Commission,* 1957, 8 Cir., 247 F. 2d 173; *City of Hastings* v. *Federal Power Commission,* 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420.

[3] The Navy consumed some of the power and resold another portion.

* * * But there is no record evidence of separate rates, separate contracts or separate rate regulation by official bodies; in short, that the 'sales' themselves were separate * * *", pp. 317–318. The petitioners here have carefully tailored their transactions to fit the above *caveat*.[4]

City of Hastings v. *Federal Power Commission*, 1954, D.C. Cir., 221 F. 2d 31, certiorari denied, 349 U.S. 420 (1955) involved a situation strikingly similar to the Lo-Vaca proposal. The City entered into two contracts with a supplier for the purchase of gas. One contract involved gas to be resold by the City and the other involved gas to be used by the City in its power plant. The gas came from out-of-state sources and was thus a "sale in interstate commerce." The gas sold under both contracts was delivered to the City in a commingled stream and, in holding the not-for-resale sale "non jurisdictional", that court said:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocations of gas and effective separate measurement facilities." [P. 36]

The situation in *North Dakota* v. *Federal Power Commission*, 8 Cir., 1957, 247 F. 2d 173, was very much like that involved here under the Houston contract. There, Montana-Dakota Utilities Company entered into two contracts for the purchase of gas for sale in intrastate market and two contracts for the purchase of gas for the interstate market. Gas under all four contracts was delivered to Montana-

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[4] *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, 1952, 343 U.S. 414 is inapplicable. That case did not involve separate transactions, etc.

Dakota in a commingled stream at one delivery point in North Dakota. Some of the gas was then resold in North Dakota and attributed to the intrastate purchase contracts. The question phrased by the court was: "* * * does natural gas produced, wholesaled, transported, and sold for immediate consumption solely within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce * * *?" [P. 176]. The court concluded:

> "There is no commingling of interstate with intrastate gas within the State of North Dakota in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota. Accordingly, the quantities of intrastate gas purchased by Montana-Dakota under the 'firm gas' [intrastate sales] contracts are easily identifiable and determinable."

We think the rationale and holdings of these cases are controlling here.[5]

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[5] In both *North Dakota* and *Hastings*, the Commission disavowed jurisdiction, taking a position directly contrary to that taken here. E.g., a passage from the Commission's brief in North Dakota (before this court by agreement):

"For those decisions make it plain that the indistinguishable commingling of jurisdictional and non jurisdictional gas in delivery is not sufficient in itself to require that sale of both be subjected to F.P.C. jurisdiction. In every case where there is commingling, indistinguishably, in a single flow, of some gas (or electricity) delivered in interstate commerce for resale, with other gas (or electricity) not delivered in interstate commerce or not for resale, it is necessary for the

The Commission here seeks to distinguish *Hastings* and *North Dakota* by the fact that, in those cases, all the gas sold was supplied by the same seller, whereas here El Paso is supplied by many sellers other than Lo-Vaca and Houston. It argues that to allow El Paso to "pick and choose" the suppliers of the "non-jurisdictional" quantities needed would be to allow the purchasing pipeline to discriminate between its various suppliers. The question, however, is whether the gas is effectively segregated by the device of a contract, rather than some physical barrier; and, therefore, the question of discrimination is irrelevant, insofar as the initial sales jurisdiction is concerned, if regulation of the sales is not within the jurisdiction of the Commission. If the gas could, in some manner, be transported in a physically segregated manner, jurisdiction would not attach; under the rationale of *Hastings* and *North Dakota*, and the language of *United States* v. *Public Utilities*, contractually-segregated gas is not jurisdictional; it must follow that discrimination *vel non* is not a proper area of inquiry. We can see no difference in the controlling legal principles here, even though the facts are somewhat different, as they are in almost all cases.

Neither is the question whether the expenditures are reasonable and prudent, and thus includable in the pipeline's cost of service for rate computation purposes, before us here. Nor is there before us any

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Commission to determine 'whether (or not) an essentially separate transaction (for the non-jurisdictional delivery) * * * is identifiable'. *United States* v. *P.U.C. of California*, 345 U.S. 295, 318. The decisions spell out the principles upon which the Commission here rightly concluded that transactions embodying the jurisdictional and non-jurisdictional elements, respectively, are separate."

question as to *transportation*, rather than *sale*, certificate authority.

The Commission's position ignores the nature of natural gas. Gas in a pipeline can be separated only "on paper" or conceptually, or, at least, this is the cheapest and most practical way to do it.[6] Gas lines *transport* gas for others, and we doubt that the owners are ever delivered the identical molecules turned over to the carrier. As we have said, gas is gas. The concept of separate identity, by volume, is not new. This Court, in a "hot oil" case, recognized that contraband oil commingled with lawfully produced oil could not be separated, as a physical fact. We concluded that both "justice and practical convenience would be served by allowing a separation as is proposed [proportional separation] * * * Commingling and proportional separation is daily practiced in the business of grain elevators, pipe lines, and the like. We see no reason why the practice is not proper here." *Federal Tender Board No. 1* v. *Haynes Oil Co.*, 1935, 80 F. 2d 468, 469.[7]

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[6] Must petitioners be driven to the unnecessary expense of constructing a parallel line to carry the "non-jurisdictional" gas or to some plan devised so that the requisite volume of gas is transported daily through the line enclosed in a sort of balloon-like envelope? Besides the question of whether such expense or cost would be allowed in computing rates to consumers, the suggested question answers itself. We are dealing with legal concepts, not Rube Goldberg devices which would waste the resources of the gas industry and the nation.

[7] *See also*, *Humble Oil and Refining Company* v. *Texas and Pacific Ry. Company*, 1955, Sup. Ct. Tex., 289 S.W. 2d 547, 552: "The fact that Humble was also shipping from New Mexico should not change the character of its shipments originating in Texas. Accordingly, we hold that the oil produced in and shipped from New Mexico to East Texas takes an interstate

We must appreciate the concern of the California intervenors for the price paid for the non-jurisdictional gas. Their plea should be made, however, to Congress and not us. The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. It may well be that the State of Texas has no incentive to regulate the cost of such gas; this, however, has no relevance in interpreting the statute, though it may have relevance in drawing or redrawing it. Our duty of statutory construction is limited to construing statutes, not constructing them.

In closing, we must comment on the Commission's assertion that petitioners "beg the question" by stating that the sales are not "jurisdictional" because, as a matter of fact, most of the gas molecules put into the lines are sold in interstate commerce and will be resold. As we see it, this is not begging the question but is merely stating it. We hold that such gas is not "resold" in interstate commerce, because it is contractually segregated and is either consumed by the pipeline itself, or resold in Texas.

It is clear, moreover, that all of the gas is *not* sold for resale in interstate commerce. It must follow that, if those volumes of gas can be segregated, the Commission has no legitimate interest in the sale of that amount of gas. The method of segregation used here seems to be the most practical one. No one has suggested to us any reason why the mixing or com-

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rate and the oil produced in West Texas and shipped to East Texas takes an intrastate rate, and this irrespective of its being commingled with other oil enroute."

mingling of this gas with other gas hampers the regulation of sale of the "jurisdictional" gas, or in any manner tends to subvert the national policy. No one has suggested that petitioners will not carefully and conscientiously carry out the terms of their contracts. In short, we can find no prejudice to anyone's legitimate interests in the consummation of these plans. The substance of the proposals is that "non jurisdictional" gas will honestly be used for "non jurisdictional" purposes. Congress' refusal to give jurisdiction over such sales, assuming it has the constitutional power to do so, should not be thwarted because of the physical nature of natural gas.

The petition for review is granted; the petitioners' request that the Commission's order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption, be set aside is granted and the case is remanded for disposition not inconsistent with this opinion.

Order vacated.

RIVES, Circuit Judge, Dissenting:

As shown in 15 U.S.C.A. § 717(b), quoted in footnote 1 to the majority opinion, the Commission has jurisdiction of (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural gas companies engaged in such transportation or sale." The questions for decision are where the Commission has jurisdiction over proposed sales of natural gas by Lo-Vaca and by Houston to El Paso.

The controlling facts as found in the opinion of the Commission are as follows:

> "Lo-Vaca * * * at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas

per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf. There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

" 'All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.'

"Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

"* * * Since 1925, it [Houston] has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be

determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢ plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, 'El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas.' El Paso further covenants that it would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas.

"The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Wink-

ler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

"El Paso proposed * * * to supply its main-line compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the commingled stream in El Paso's line at the Keystone Compressor Station.

"Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6,091 M²cf per day and on a maximum day would exceed the supply by 31,879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is proposed for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

"The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-

> Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21,373 M²cf per day on an average day and by 36,549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California."

Thus Houston's and Lo-Vaca's respective contracts with El Paso attempt to restrict the use of the gas to nonjurisdictional purposes, and provide, on the principle of "fungibility," that if their gas is not in fact used for the contractually stated nonjurisdictional purpose, an equal volume of gas supplied by some other supplier will be so used. The Commission refused to let its jurisdiction turn upon the provisions of contracts that do not correspond and are not intended to correspond to reality. I agree with the Commission.

Whether gas is transported in interstate commerce or is sold in interstate commerce for resale depends not on what the parties say about the transaction but on what is done with the gas. This Court so held in *Deep South Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F. 2d 882, and its companion case, *Shell Oil Co.* v. *F.P.C.*, 5 Cir. 1957, 247 F 2d 900. In decisions of analogous questions, the Supreme Court has continually disregarded contracts which give a fictional construction to business transactions. See *e.g.*, *Sprout* v. *South Bend*, 1928, 277 U.S. 163, 168; *B. & O. S.W. RR* v. *Settle*, 1922, 260 U.S. 166, 170; *Eureka Pipe Line Co.* v. *Hallanan*, 1921, 257 U.S. 265, 272. As said in *Connecticut Co.* v. *Power Comm'n*, 1945, 324 U.S. 515, 529: "Federal jurisdiction was to follow the flow

of electric energy, an engineering and scientific, rather than a legalistic or governmental, test."

A detailed discussion of the facts of the cases relied on by the majority would unduly prolong this opinion. Carefully considered, I submit that none of those cases permit a finding of nonjurisdictional status solely upon the language of the contract, but in each case, in addition to the language purporting to restrict use of the gas or electricity to nonjurisdictional purposes, there was also an actual flow of the gas or electricity from the nonjurisdictional seller into the particular "restricted" use. In no previous case has jurisdiction been permitted to turn upon the provisions of contracts not corresponding and not intended to correspond to reality.

The Commission's jurisdiction over the proposed sales of natural gas by La Vaca and by Houston to El Paso is much more clear than its jurisdiction sustained in *United Gas Pipe Line Company*, Opinion No. 401 of the Commission issued August 26, 1963.

I respectfully dissent.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

October Term, 1962

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

JUDGMENT

This cause came on to be heard on the Petition of Lo-Vaca Gathering Company, Houston Pipe Line Company and El Paso Natural Gas Company, for review of an order of the Federal Power Commission issued on October 23, 1961 in Docket Nos. CI60-693, Et Al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and the same is

hereby, granted; the petitioners' request that the Commission's Order, declaring the sales to be sales in interstate commerce for resale for ultimate public consumption be set aside is granted; and that this cause be, and it is hereby, remanded to the Commission for disposition not inconsistent with the opinion of this Court.

RIVES, Circuit Judge, dissents.

September 24, 1963.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 19478

LO-VACA GATHERING COMPANY, HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

SOUTHERN CALIFORNIA GAS COMPANY, ET AL, INTERVENOR-RESPONDENTS

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION (TEXAS CASE)

(December 17, 1963)

ON PETITION FOR REHEARING

Before RIVES and CAMERON, Circuit Judges, and BOOTLE, District Judge.

Per Curiam

This cause coming on for hearing upon the petition for rehearing filed on behalf of the Respondent Federal Power Commission, together with motion for rehearing by the Court en banc, joined in by Southern California Gas Company et al as Intervenor-

Respondents, and the Court having considered the same and the briefs filed in support and in opposition thereto, it is ordered and decreed that the said petitions for rehearing and also the motion for rehearing en banc be, and they hereby are, DENIED.

"RIVES, Circuit Judge, Dissents."

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